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Supreme Court of the United States

OCTOBER TERM, 1960

KARL L. PEDERSEN,

Libelant,

—against—

Tanker BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KARL L. PEDERSON, *Petitioner*

By ARTHUR K. ASH
Proctor for Petitioner
15 Park Row
New York, N. Y.

HERBERT LEBOVICI
JACK STEINMAN
On Petition

Dated: New York, N. Y.
May, 1960

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Supreme Court of the United States

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KARL L. PEDERSEN,

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—against—

Tanker BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Karl L. Pedersen, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, filed February 26, 1960, affirming a final decree entered in the United States District Court for the Eastern District of New York, on the 23rd day of March, 1959, upon the opinion of Zavatt, *D.J.*, which opinion also constituted the District Court's Findings of Fact and Conclusions of Law.

The opinion of the Court of Appeals, Appendix A of this petition, is not yet officially reported. The opinion of the District Court by Zavatt, *D.J.*, dismissing the libel and dismissing the impleading petition without prejudice, is

set forth in full on pages 48a through 57a of the appendix for the libellant-appellant in the Court below, and is reported at 190 F. Supp. 462.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C. A., Section 1254 (1). The judgment of the Court of Appeals affirming the decree dismissing the libel was entered on February 26, 1960, the appeal having been argued on the 4th day of February 1960. Said judgment is contained in Appendix B hereof.

Questions Presented

1. Does the per curiam opinion of the Court below affirming the decision of the District Court, conflict with Maritime Law principles long applied by this Court imposing liability *in rem* for torts committed aboard vessels in navigable waters?

2. Whether a business invitee, properly aboard a vessel in navigable waters, is entitled to recover against the vessel *in rem* where his injuries "were caused solely by the negligence of Todd (52a),* the respondent-impleaded shipyard which was lawfully in possession of the vessel.

3. Did the Courts below erroneously hold that no maritime lien could arise merely because the vessel was ". . . temporarily withdrawn from navigation"?

Statement of the Case

This is an action *in rem* for damages for personal injuries sustained by a business invitee while working aboard

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* References are to pages of libellant's appendix in the Court below.

the Tanker BULKLUBE in navigable waters on August 8, 1952. Jurisdiction was obtained pursuant to process *in rem* under which the vessel was arrested. Subsequently, stipulations for value and costs, and a claim of owner were filed, and thereafter a motion to implead the shipyard was granted.

At the outset, we point out that the facts herein are undisputed, and may be taken from the findings of the District Court.

Briefly stated, the vessel BULKLUBE was delivered to Todd on June 22, 1952 for certain "rather extensive repairs" and was returned to its owner on December 19, 1952 (48a). In this regard we point out that the BULKLUBE was described by the District Court, notwithstanding the extensive work to its interior, in the following terms (50a):

> "However, the shell of the vessel, those members of the vessel corresponding to the keel, including the keelson, and the external structures of the vessel above the main deck, such as the bridge house, the bridge, and the after structures, were substantially undisturbed."

The vessel then entered upon the "further performance" of a charter party which had been in effect when the vessel was delivered to Todd on June 22, 1952 (51a). On December 19, 1952 the vessel sailed from New York to Texas City to load a cargo of petroleum. The District Judge found, *inter alia*, that the vessel had been "temporarily withdrawn from navigation" (57a).

The accident herein occurred on August 8, 1952.

The District Court expressly found "that the injuries to Pedersen were caused solely by the negligence of Todd in failing to properly construct the staging upon which Pedersen was required to perform his work" (52a).

Furthermore it was stipulated that Pedersen had taken no part in the constructing of the staging (51a).

There is no dispute but that at the time of this negligence the vessel was in the lawful possession of Todd, the vessel having been delivered pursuant to a contract between the shipowner and Todd (47a, 48a, 49a).

During the course of the repair work it had become necessary that the libellant climb upon a staging in one of the tanks of the BULKLUBE. The staging upon which he stood consisted of a single plank some 12 feet long, 12 inches wide, and 2 inches thick, which rested at either end upon a metal bracket welded to the wall of the tank. There were no angle irons to support the brackets of the staging. As Pedersen stood on the after end of the plank and a coworker upon its forward end, the bracket supporting the forward end collapsed and Pedersen was thrown and fell to the bottom of the tank (50a-51a).

The staging had been approximately 40 to 50 feet from the bottom of the tank, and the injuries sustained exceedingly serious (50a).

The District Court in deciding the factual issues presented found that the shipowner exercised no control over the methods of work employed by Todd in the performance of its contract, and would not have been liable *in personam*.

Without citing controlling authority, the District Court rejected libellant's main contention that the vessel was liable to him *in rem* for the tort of anyone who was in lawful possession of the vessel. Its decision in this respect is predicated upon the assumption that a vessel temporarily withdrawn from navigation is not the proper subject of a maritime lien, although it also argued that the lack of a right over against the tort feasor prevented any such lien from arising.

In so doing, the Court below failed to properly recognize well established authority in this Court such as *The China*, 7 Wall. 53, *The John G. Stevens*, 170 U. S. 113, *The Brig Malek Adhel*, 43 U. S. 210, and *The Barnstable*, 181 U. S. 464, which establish that a vessel is liable *in rem* for the tort of anyone who is in lawful possession of her. The Court below further failed to recognize that a maritime lien attaches to a vessel irrespective of the fact of its temporary withdrawal from navigation. The Court below erroneously assumed that no maritime lien could attach unless the vessel was actually actively engaged in navigation as an instrument of commerce.

In brief, the Court below failed to apply settled principles of *in rem* liability established by this Court and various Courts of Appeals of other circuits, which clearly impose liability *in rem* where an injury occurs aboard a vessel through the negligence of anyone lawfully in possession of her, regardless of whether the vessel is actually engaged at the moment as a moving entity in active commerce.

Reasons for Granting the Writ

The questions presented are important as affecting the rights and liabilities of many people in a far-flung industry which is affected with the public interest.

The decision below narrows and constricts applicable decisions of this Honorable Court, such as *The China*, and *The Barnstable, supra*, and conflicts with them in principle.

The decision below conflicts with time-honored decisions in courts of this and other circuits, such as *The Anaces*, 93 Fed. 240, *The Kate Cann*, 2 Fed. 241, affirmed 8 Fed.

719, and *Turner* v. *U. S.*, 27 Fed. 2d 134. The decision below is also inconsistent with an earlier decision in the same circuit, to wit, *Grillea* v. *U. S.*, 232 Fed. 2d 919, which has been approved by this Honorable Court in *Crumady* v. *Fisser*, 358 U. S. 423.

Uniformity in this particular field of law is especially required and necessitates a current controlling decision by this Honorable Court.

As recently as the case of *Grillea* v. *The United States*, *supra*, decided in 1956 by the Court of Appeals for the Second Circuit, it was said that a maritime lien can be imposed upon a ship for a claim on which no jural person is liable *in personam*. The Court went on to state that it saw no reason why a person's property should never be liable unless he or someone is liable *in personam*.

Apart from the question of whether or not there may be any other jural person liable *in personam*, the law as laid down by this Court is crystal clear that a maritime lien can be imposed upon a ship where the owner is completely without fault, and the instances of such liability are numerous.

A classic example is that of *The China*, *supra*, wherein a vessel was held liable *in rem* for the negligence of a compulsory pilot.

Justice Holmes in his famous work "The Common Law" says (at pages 26 and 27):

> "It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and as that supposition they at once become consistent and logical.

By way of seeing what those peculiarities are, take first, a case of collision at sea. A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the leasee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot be charged on the ground that the damage was done by his servants. *He is free from personal liability on elementary principles. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done* (case cited), and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her." (Italics added.)

We have demonstrated above that a shipowner's freedom from personal liability does not negate liability of the vessel *in rem* for tort claims, personal injury or other variety.

Nor, as the Court below supposed, does the existence of such liability *in rem* rest upon the ability of the innocent shipowner, whose vessel is so liable, to obtain indemnity or recovery over. In this connection we cite the case of *Turner* v. *The United States*, 27 Fed. 2d 134, where the Court stated at page 136:

"The offending ship is considered as herself the wrongdoer and as herself bound to make compensation for the wrongdoing. The owner of the injured vessel is entitled to proceed against the offender without regard to the question who may be her owners, or to the division, the nature or extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern."

See also *The Kate Cann, supra.*

So here the libellant has no concern with any right over, or the lack of same which the shipowner may or may not have.

Although not relevant for present considerations, Todd could in fact well be liable if its negligence created a liability on the part of the vessel. See *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124.

It must be remembered in the case at bar that the District Court found that the injuries were caused solely by the negligence of Todd and it must be further remembered that Todd was in lawful possession of the vessel which it obtained pursuant to a contract with the shipowner.

Thus is presented the situation of a wrong done aboard a vessel in the lawful possession of one whom the shipowner had put in possession. The Court below and respondents urge that no lien can be imposed for this tort since the vessel had been "temporarily withdrawn from navigation." The law simply does not sustain such position.

The settled rule of law is that the jurisdiction of the admiralty in matters of tort depends on the locality of the tort—whether the wrong was committed upon a vessel in navigable waters.

See:

The Plymouth, 70 U. S. 20;
North Pacific S.S. Co. v. Hall Bros. Co., 249 U. S. 119;
Grant Smith Porter Co. v. Rohde, 257 U. S. 469.

Such wrongs give rise to maritime liens.

See:

The John G. Stevens, supra;
The Anaces, supra.

The District Court's opinion here affirmed by the *per curiam* decision below, for the first time superimposes as an additional requirement of tort jurisdiction in admiralty, that the vessel must be in active navigation. No authority is given or found for such variation from established requirements.

It is only in cases involving maritime liens *ex contractu* that the concept of a vessel in actual navigation has been of significance. However, even in such cases, maritime liens have been imposed on vessels once committed to navigation but not actively engaged therein even extending to the following: a vessel in the process of being dismantled to be taken out of navigation (*The C. H. Northam*, 181 Fed. 983); a sunken drillboat (*Eastern S.S. Corp.* v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497); a floating dance hall, described in the opinion as, approaching the position of a ship temporarily withdrawn from commerce and moored to a dock (*The Ark*, 17 Fed. 2d 446); and last, a vessel under repair in a shipyard as in the case at bar (*Hercules Co.* v. *The Brigadier General Absolom Baird*, 214 Fed. 2d 66). See also Title 1 U. S. C. A. 3.

This Honorable Court itself has rejected the application of the "dead ship" theory in lien cases where the facts were much more susceptible of such application than here. In *North Pacific S.S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, this Court affirmed the assertion of a maritime lien on a vessel moored at a dock and in need of very extensive repairs. The vessel had been wrecked and submerged for a long time. Ice floes had torn away her upper decks and even bottom plates required replacement. She was under charter for a voyage to be commenced as soon as the necessary repairs were done. Yet, *sub judice* not only were the ship's shell, keel and external structures essentially undisturbed, as found by the District Court, but the vessel actually sailed after the repairs upon the further performance of a charter

party already in existence when the vessel was taken to the drydock after performing the initial services under the charter.

If we look to such cases as above cited and such as the *Ouyhee*, 60 Fed. 2d 641, certainly there would be a lien for the unpaid balance of the agreed price of repairs upon a vessel being "rebuilt" to the same extent as the vessel here. If a libel *in rem* would be created *ex contractu* no reason is perceived why a libel *in rem* should not be created in favor of one who receives personal injuries in the course of performing the work contracted for. See *The Anglo-Patagonian*, 235 Fed. 92 at p. 94. Thus even assuming, *arguendo* that the question of whether a lien for a tort arises is governed by the same considerations as would govern a lien *ex contractu*, it is seen that a lien *ex contractu* would arise here.

However, liens for torts may arise under circumstances beyond where liens *ex contractu* might not arise. In ultimate, *in rem* liability is a species of limited liability without fault: liability limited to the value of the vessel. In the Maritime Law, unlimited liability without fault is too well recognized to make further mention ever since the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

There is no dispute but that the vessel was in navigable waters at the time of the occurrence, no dispute that it was under charter at the time of the repairs, and that at the completion thereof it entered upon the further performance of the charter party, and sailed to load a petroleum cargo when the repairs were done. Thus this vessel was, *a fortiori*, subject to a maritime lien when one considers that maritime liens have been applied even to dismantled vessels and sunken vessels.

Finally, no question is raised anywhere, nor, indeed, can a question be raised as to whether or not the staging was

properly part of the vessel. In this connection we cite *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, and *Lawlor* v. *Bethlehem Steel Company* (not yet officially reported), decided by the Court of Appeals for the Second Circuit on March 8, 1960, where a ladder was considered part of the vessel.

Upon all the foregoing authorities, it is clear that the principle is anciently and firmly woven into our law that a vessel is liable *in rem* for the tort of anyone in lawful possession thereof in navigable waters. It is equally clear that a temporary hiatus in its active service does not so change the character of a vessel as to deprive it of its attribute as the subject of such lien. Such notions of "withdrawal" from navigation as may be pertinent in such cases as *Desper* v. *Starved Rock Ferry*, 342 U. S. 187, to determine who may be a seaman for purposes of the Jones Act, Title 46 U. S. C. A. are not here pertinent. Even the cases of liens *ex contractu* above referred to have recognized that such liens arise on vessels "temporarily withdrawn" from navigation. Since tort liability *in rem* rests on the test of locality, *a fortiori*, tort liens arise in such circumstances.

CONCLUSION

A matter of general and substantial importance governed by Federal Law is presented herein on the basis of the authorities above set forth. The decision of the Court below appears to be in conflict not only with other decisions in the same Court, but in conflict with decisions of other District Courts and Courts of Appeals for other Circuits, and most important, in conflict, on principle at least, with decisions of this Honorable Court.

WHEREFORE, inasmuch as the decision below is so clearly erroneous as to make argument unnecessary before this Honorable Court, petitioner respectfully prays that a *writ of certiorari* be granted and that this Court reverse the Court below with instructions to remand the case to the District Court for the entry of a decree in petitioner's favor and for such further proceedings as may be required to assess damages, or any other relief as to the Court may seem just and proper.

Respectfully submitted,

KARL L. PEDERSON, *Petitioner*

By ARTHUR K. ASH
Proctor for Petitioner

Dated: New York, N. Y.
May, 1960

HERBERT LEBOVICI
JACK STEINMAN
On Petition

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 179—October Term, 1959.

(Argued February 4, 1960 Decided February 26, 1960.)

Docket No. 25714

KARL L. PEDERSEN,

Libellant-Appellant,

—against—

THE TANKER BULKLUBE, her engine, tackle, appurtenances, etc.,

Claimant-Respondent-Appellee,

—and—

TODD SHIPYARDS CORPORATION,

Respondent-Impleaded-Appellee.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and MADDEN, *Judge*, United States Court of Claims.*

Appeal from a final decree of the United States District Court for the Eastern District of New York, in Admiralty. Joseph C. Zavatt, *Judge.*

* Sitting by designation.

Libellant appeals from a decree dismissing his libel. Opinion below reported at 170 F. Supp. 462. *Affirmed.*

HERBERT LEBOVICI, New York, N. Y. (Lebovici & Safir, New York, N. Y., on the brief), *for libellant-appellant.*

VICTOR S. CICHANOWICZ, New York, N. Y. (Paul M. Jones and Cichanowicz & Callan, New York, N. Y., on the brief), *for claimant-appellee.*

PATRICK E. GIBBONS, New York, N. Y. (Galli, Terhune, Gibbons & Mulvehill, New York, N. Y., on the brief), *for impleaded-respondent.*

PER CURIAM:

The decree is affirmed on the opinion of Judge Zavatt, 170 F. Supp. 462.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty.

Present:

HON. J. WARREN MADDEN,
Judge, U. S. Court of Claims.
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

KARL L. PEDERSEN,
Libelant-Appellant,

—v.—

THE TANKER "BULKLUBE," her engines, tackle, appurtenances, etc.,
Respondent-Appellee,

—and—

TODD SHIPYARDS CORPORATION,
Respondent-Impleaded-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIEL FUSARO
Clerk